

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DUANE BAUER,

Plaintiff,

v.

PAN-AMERICAN LIFE INSURANCE  
COMPANY,

Defendant.

CASE NO. C06-835JLR

ORDER DENYING IN PART  
AND GRANTING IN PART  
MOTION FOR SUMMARY  
JUDGMENT

This matter comes before the court on Plaintiff Dr. Duane Bauer's motion for partial summary judgment (Dkt. # 18). The court has considered the papers filed in support of and in opposition to this motion as well as the oral argument of counsel. In his motion, Dr. Bauer asks the court to find that there is no genuine issue of material fact regarding his eligibility for benefits under the Additional Monthly Benefit and Social Insurance Benefit riders that he purchased from Defendant Pan-American Life Insurance Company ("Pan-American"). For the reasons stated below, the court GRANTS in part and DENIES in part Dr. Bauer's motion.

**I. BACKGROUND**

On February 1, 1991, Dr. Bauer purchased an Income Protection Policy ("primary policy" or "policy") from Pan-American. Engle Decl. ¶ 6, Ex. 4 (Dkt. # 20). Dr. Bauer

1 also purchased two riders, termed the “Additional Monthly Benefit” (“AMB”) and  
2 “Social Insurance Benefit” (“SIB”). *Id.* The Income Protection Policy was designed to  
3 “pay for losses of income due to disabilities beginning while this policy is in force.” *Id.*  
4 Dr. Bauer also purchased a Regular Occupational rider which allowed him to qualify for  
5 benefits if he met the definition of “Regular Occupation Total Disability” rather than  
6 “Total Disability.” *Id.* Under the policy, “Regular Occupation Total Disability” occurs  
7 when the insured “[c]annot work at his or her regular occupation because of injury or  
8 sickness; and, [m]ust be under the regular care of a doctor. If in the opinion of the doctor  
9 there is no doubt that the Insured is disabled and future or continued treatment would be  
10 of no benefit to the Insured, the requirement for regular care of a doctor is satisfied.” *Id.*  
11 The contract also contains an integration clause which states: “This policy, the attached  
12 application and any riders or endorsements make up the entire contract.” *Id.*  
13

14 For purposes of this motion there are three key provisions of the Income Protection  
15 policy, the notice of claim provision, the claim forms provision and the proofs of loss  
16 provision. These provisions provide as follows:  
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18 Notice of Claim – Written notice of claim must be given within 6 months  
19 after a covered loss starts or as soon as reasonably possible. The notice must  
20 be given at the Home Office, New Orleans, Louisiana. Notice should  
21 include your name and the policy number.

22 Claim Forms – When we receive the notice of claim, we will send the  
23 claimant forms for filing proof of loss. If these forms are not mailed to the  
24 claimant within 15 days, the claimant will meet the proof of loss  
25 requirements by sending us a written statement of the nature and extent of  
26 the loss within the time limit stated in the Proofs of Loss section.

27 Proofs of Loss – If the policy provides for periodic payment for a continuing  
28 loss, written proof of loss must be sent to us within 90 days after the end of  
each period for which we are liable. For any other loss, written proof must  
be given within 90 days after such loss. If it is not reasonably possible to  
give written proof in the time required, we shall not reduce or deny the claim  
for this reason if the proof is filed as soon as reasonably possible. In any

1 event, the proof required must be given no later than 1 year from the time  
2 specified unless the claimant was legally incapacitated.

3 *Id.*

4 From 1987 until June 2004, Dr. Bauer worked as a chiropractor at a practice in  
5 Renton, Washington. Engle Decl. ¶ 3, Ex. 1. Dr. Bauer claims in June 2004 that he  
6 became disabled by bilateral thumb arthritis which prevented him from continuing in his  
7 chiropractic practice. Mot. at 2. Dr. Bauer notified Pan-American by telephone on June  
8 22, 2004 that he was disabled. Engle Decl. ¶ 4, Ex. 2. Pan-American sent Dr. Bauer a  
9 “Proof of Loss” form which he filled out and sent back to Pan-American. Pan-American  
10 received the completed form on July 8, 2004. *Id.* On August 19, 2004, Pan-American  
11 acknowledged that it had received Dr. Bauer’s proof of loss and that Pan-American  
12 needed additional information by September 10, 2004. *Id.* Over the next few months Dr.  
13 Bauer sent Pan-American the requested information. In January 2005, Pan-American  
14 informed Dr. Bauer that his claim was “in the evaluation process” and requested  
15 additional information. *Id.* On March 24, 2005, Pan-American again informed Dr. Bauer  
16 that his claim was “being evaluated.” *Id.* On May 10, 2005, an agent for Pan-American  
17 conducted an in-person interview of Dr. Bauer. *Id.*

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20 In the spring of 2005, Dr. Bauer filed a complaint regarding the handling of his  
21 claim with the Washington insurance commissioner. *Id.* On June 17, 2005, in a letter  
22 addressed to the Office of the Insurance Commissioner, Pan-American stated that it had  
23 decided to deny Dr. Bauer’s claim. *Id.* On January 4, 2006, Dr. Bauer became aware of  
24 the denial when his counsel received his claim file from Pan-American. *Id.* Dr. Bauer  
25 appealed this determination.

26 On May 18, 2006, Pan-American’s medical reviewer, after considering additional  
27 medical records submitted by Dr. Bauer, concluded that “that there is objective clinical  
28

1 documentation to support the claimant's assertion that he has been unable to perform the  
2 material and substantial duties of his own occupation as a chiropractor on the basis of []  
3 bilateral CMC joint arthritis." *Id.* This determination was based largely on medical  
4 reports provided by Dr. Bauer dated October 21, 2005 and January 21, 2006. Despite  
5 this finding Pan-American did not pay Dr. Bauer's claim.

6  
7 On June 12, 2006, Dr. Bauer filed this lawsuit (Dkt. # 1). On April 2, 2007, Pan-  
8 American put Dr. Bauer on claim status and informed him that he would receive the  
9 monthly benefit amount under the primary policy on a going-forward basis. Engle Decl.  
10 ¶ 5, Ex. 3. The letter also stated: "If Dr. Bauer intends to pursue claims under additional  
11 coverages or provisions of the Pan American policy, please advise us promptly and  
12 provide proof of claim or loss as required." *Id.* On April 20, 2007, Dr. Bauer sent a  
13 letter to Pan-American specifically requesting "payment of full benefits under the Social  
14 Insurance Rider and Additional Monthly Benefit Rider" of his policy and that he had  
15 "always maintained a claim for these benefits." Engle Decl. ¶ 7, Ex. 5.  
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## 17 II. ANALYSIS

### 18 A. Legal Standard

19 Summary judgment is appropriate if the evidence, when viewed in the light most  
20 favorable to the non-moving party, demonstrates there is no genuine issue of material  
21 fact. Fed. R. Civ. P. 56©); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v.*  
22 *County of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the  
23 initial burden of showing there is no material factual dispute and he or she is entitled to  
24 prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets its  
25 burden, the nonmoving party must go beyond the pleadings and identify facts which show  
26 a genuine issue for trial. *Cline v. Indus. Maint. Eng'g. & Contracting Co.*, 200 F.3d  
27 1223, 1229 (9th Cir. 2000).  
28

**B. Notice**

Pan-American argues that Dr. Bauer did not comply with the policy's requirement that "written notice of claim must be given within 6 months after a covered loss starts." Resp. at 9 (emphasis in original). It argues that the terms of the policy make it "clear" that separate applications for different benefits are required. Resp. at 8. Pan-American quotes the portion of the "Notice of Claim" provision which states that written notice must be given within 6 months "after a covered loss starts." *Id.* Pan-American points to Dr. Bauer's April 20, 2007 letter as the first time it was provided with notice that Dr. Bauer was seeking benefits under either the AMB or SIB riders. Resp. at 9-10. Pan-American claims that because it is undisputed that "this notice" did not occur until more than two years after Dr. Bauer's June 2004 disability date, the sufficiency of Dr. Bauer's notice must be determined by examining whether notice was given "as soon as reasonably possible." Resp. at 10. Pan-American contends that there is a genuine issue of material fact on the question whether Dr. Bauer provided notice under the AMB and SIB riders as soon as reasonably possible.

Dr. Bauer contends that the issue is not that complex. He points out that the riders do not contain their own separate Notice of Loss provisions; instead, they provide: "The rider is part of the policy and subject to its provisions." Engle Decl. ¶ 6, Ex. 4.

It is undisputed that on June 22, 2004, Dr. Bauer contacted Pan-American via telephone to notify it of his disability claim. Engle Decl. ¶ 4, Ex. 2. It is undisputed that on July 8, 2004, Pan-American received a proof of loss claim form from Dr. Bauer. *Id.* It is undisputed that the loss Dr. Bauer is seeking to have covered by the riders is the same loss reported on June 22, 2004. Pan-American has not pointed to any requirement in either rider that Dr. Bauer give separate notice of loss for each portion of the policy

1 under which he is seeking benefits. The court finds Pan-American's argument that the  
2 language of the "Notice of Claim" provision requires separate notice for each rider or  
3 claimed benefit unpersuasive, no such requirement can be read into the contract language.  
4 No genuine issues of material fact remain as to whether Dr. Bauer provided notice of his  
5 loss and he is entitled to a ruling as a matter of law that he provided proper notice of loss  
6 for both the AMB and SIB riders.  
7

8 **C. Proofs of Loss**

9 Pan-American argues that there are genuine issues of material fact as to whether  
10 Dr. Bauer complied with the proofs of loss provision for both the AMB and SIB riders.  
11 Resp. at 10-15. Neither rider contains a separate proofs of loss provision and so the  
12 policy's proofs of loss provision governs. Pan-American contends that Dr. Bauer did not  
13 timely submit his proof of loss. The policy provides:

14 Proofs of Loss – If the policy provides for periodic payment for a continuing  
15 loss, written proof of loss must be sent to us within 90 days after the end of  
16 each period for which we are liable. For any other loss, written proof must be  
17 given within 90 days after such loss. If it is not reasonably possible to give  
18 written proof in the time required, we shall not reduce or deny the claim for  
19 this reason if the proof is filed as soon as reasonably possible. In any event,  
20 the proof required must be given no later than 1 year from the time specified  
21 unless the claimant was legally incapacitated.

22 Engle Decl. ¶ 6, Ex. 4. Pan-American claims that there is a genuine issue of material fact  
23 as to whether Dr. Bauer complied with the "1 year" provision or in the alternative  
24 whether he provided his proof of loss as soon as "reasonably possible."

25 Dr. Bauer points out that Pan-American twice informed him that his disability  
26 claim was "in the evaluation process" signaling that he had submitted sufficient proof of  
27 his claim. Engle Decl. ¶ 4, Ex. 2. The second letter sent by Pan-American did state that  
28 it needed additional information. *Id.* Dr. Bauer argues that in any event, sufficient proof  
of loss was submitted within the 1-year period. Mot. at 13.

1 In the alternative, Dr. Bauer argues that the Washington Court of Appeals’  
2 decision in *Kaplan v. Northwest Mut. Life Ins. Co.*, 990 P.2d 991 (Wash. Ct. App. 2000),  
3 is applicable here and that the “Proofs of Loss” provision should be read to mean that  
4 notice is required during the “period for which the person was or is disabled.” Mot. at  
5 14-15.

6 The *Kaplan* court interpreted an almost identical provision that provided:

7  
8 Written proof of disability . . . must be given within 90 days *after termination*  
9 *of the period for which the Company is liable*. Failure to give proof within the  
10 time required shall not invalidate nor reduce any claim if it was not reasonably  
11 possible to give proof within such time; however, proof must be given not later  
than one year from the time proof is otherwise required except in the absence  
of legal capacity.

12 990 P.2d at 997 (emphasis added). In *Kaplan*, the insurance company argued that the  
13 policy should be read to require proof of claim within 90 days after termination of the  
14 monthly period for which it was liable despite the fact that the word “monthly” did not  
15 appear in the text. *Id.* The court noted that “[t]he policies state that proof must be given  
16 90 days ‘after termination of the period for which the company is liable.’ Because the  
17 period for which Northwestern is liable is the period of Kaplan’s disability, which  
18 continues to the present, the 90-day period after termination and the absolute one-year  
19 period have not yet begun to run. Therefore, we hold that Kaplan’s proof of disability  
20 was timely regardless of whether Kaplan gave proof as soon as reasonably possible.” *Id.*  
21 The court also examined three subsequently issued policies that included the word  
22 “monthly” before the word “period” and held that once the insurance company inserted  
23 the word “monthly” into the policy that the claimant would have to prove that he  
24 provided notice within the specified time period or as soon as reasonably possible. *Id.*  
25 The court finds the reasoning in the *Kaplan* decision persuasive.

26  
27 Interpretation of an insurance contract is a matter of law. *See Woo v. Fireman’s*  
28 *Fund Ins. Co.*, 164 P.3d 454, 459 (Wash. 2007). Insurance contracts are interpreted

1 according to the way the contract would be “understood by the average insurance  
2 purchaser.” *State Farm Gen. Ins. Co. v. Emerson*, 687 P.2d 1139, 1142 (Wash. 1984).  
3 Here, the language at issue is: “written proof of loss must be sent to us within 90 days  
4 after the end of *each* period for which we are liable.” Engle Decl. ¶ 6, Ex. 4 (emphasis  
5 added). Pan-American asserts that Dr. Bauer is asking the court to ignore a critical  
6 difference in the policy language between *Kaplan* and this case, the addition of the word  
7 “each” before the word “period.” Resp. at 14. However, the language does not specify  
8 when “each period” for which the company is responsible ends. It would be entirely  
9 reasonable for the average insurance purchaser to assume that if he became disabled and  
10 the disability continued for several years that there would be one period for which the  
11 insurer was responsible. Interpreting the language in the way that it would be understood  
12 by the average insurance purchaser, the court finds that there are no genuine issues of fact  
13 and determines as a matter of law that neither the 90-day nor one year period for  
14 providing proofs of loss have begun to run and that Dr. Bauer’s proof of loss was timely.

17 **D. Compliance with the Substantive Requirements of the Riders**

18 **1. Additional Monthly Benefit**

19 Pan-American contends that the substantive requirements of the AMB rider are as  
20 follows: “Total Disability – If total disability begins while this rider is in force and lasts  
21 longer than the Elimination Period, we will pay the Monthly Benefit for each additional  
22 month total disability continues beyond the Elimination Period.” Resp. at 3. The  
23 “Elimination Period” is defined as “the period of time disability must last before benefits  
24 become payable.” Engle Decl. ¶ 6, Ex. 4. The Elimination Period for the AMB rider is  
25 60 days. *Id.* The AMB rider does not define “Total Disability,” instead referring to the  
26 policy. The policy’s definition of “Total Disability” has been modified by the Regular  
27 Occupation rider to the following:  
28



1 Regular Occupation Total Disability occurs when the Insured: Cannot work at  
2 his or her regular occupation because of injury or sickness; and [m]ust be under  
3 the regular care of a doctor. If in the opinion of the doctor there is no doubt that  
4 the insured is disabled and future or continued treatment would be of no benefit  
5 to the Insured, the requirement for regular care of a doctor is satisfied. Regular  
6 Occupation means the occupation (or occupations, if more than one) in which  
7 the Insured is engaged at the start of disability.

8 *Id.*

9 Pan-American argues that, “the [Attending Physician’s Statement] and tax records  
10 Bauer eventually submitted were deficient on their face.” Resp. at 10. Apparently it  
11 believes that there is some additional unspecified requirement that Dr. Bauer must meet  
12 to qualify for benefits, even though it has already determined that Dr. Bauer meets the  
13 definition of Regular Occupation Total Disability under the primary policy, using the  
14 records (and others that were subsequently provided) that it now claims are deficient.

15 Dr. Bauer persuasively argues that “[w]hen Pan-American conceded that Plaintiff  
16 ha[d] been continuously disabled since 2004, it admitted he ha[d] been disabled longer  
17 than the 60-day Elimination Period required under the AMB rider.” Mot. at 10. The  
18 court finds that there are no genuine issues of material fact with respect to whether Dr.  
19 Bauer complied with the substantive requirements of the AMB rider and that as a matter  
20 of law he is eligible for that benefit.

## 21 **2. Social Insurance Disability Benefit**

22 Pan-American argues that there are several relevant eligibility terms in the SIB  
23 rider including the following: (1) the insured must have been disabled for twelve  
24 continuous months; (2) the policy benefit is payable for the disability; (3) the insured is  
25 eligible for social security disability benefits when the disability started; (4) the insured  
26 must apply for social security disability benefits within six months of the start of the  
27 period of disability; (5) the insured is receiving no social security benefits; and (6) the  
28 rider is then in force. Resp. at 3. Pan-American also contends that the proof of loss

1 requirement for SIB benefits also includes the insured's correspondence with the provider  
2 of the social benefit. *Id.* There is no dispute that Dr. Bauer has satisfied items 1, 2, 5,  
3 and 6. Additionally, the record reflects that Pan-American has received copies of Dr.  
4 Bauer's correspondence with the Social Security Administration. Huber Decl. ¶ 5 (Dkt. #  
5 25); Supp. Engle Decl. ¶ 5, Ex. 3 (Dkt. # 27); Resp. at 15.

6  
7 **i. Application for Social Security Within 6 Months of Disability**

8 Pan-American states that there is a question of fact regarding Dr. Bauer's  
9 eligibility for the benefits under the SIB rider because he did not apply for social security  
10 benefits until September 2006 which was more than 6 months after the onset of his  
11 disability in June 2004. Resp. at 14-15; Bauer Decl. ¶ 7 (Dkt. # 19).

12 Dr. Bauer contends that the requirement that he apply for social security disability  
13 benefits within six months of his disability must be construed within the construct of the  
14 SIB rider's other requirements. Mot. at 20. Dr. Bauer argues that, "the only reasonable  
15 interpretation is that Plaintiff must apply for Social Security Disability benefits within six  
16 months of the date Pan-American determined that he was disabled." *Id.* Dr. Bauer  
17 questions why Pan-American would have expected him to apply for social security  
18 disability benefits six months before he became eligible for benefits under the rider (Dr.  
19 Bauer had to be disabled for 12 months before he could obtain benefits under the rider).  
20 Mot. at 21. Dr. Bauer also points out that it would have been fruitless for him to apply  
21 for social security benefits from the Social Security Administration as he needed to have  
22 been disabled for 12-months before he would have qualified for benefits.<sup>1</sup> *Id.* Pan-  
23 American did not determine Dr. Bauer was disabled until April 2, 2007. Engle Decl. ¶ 5,  
24 Ex. 3. Using this date Dr. Bauer contends that his notice was timely.

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28 <sup>1</sup>The Social Security Administration website, <http://www.ssa.gov/d&s1.htm> (last visited October 12, 2007), cited by Dr. Bauer counsels that an applicant should "[a]pply as soon as you become disabled."

1 The language in the contract is clear: “The Insured must apply for Social  
2 Insurance disability benefit within six months of the start of the period of disability.”  
3 Engle Decl. ¶ 6, Ex. 4. Dr. Bauer did not apply for social security disability benefits until  
4 September 2006, which is more than six months after the onset of his disability in June  
5 2004. Bauer Decl. at ¶ 7. The court finds that there is no genuine issue of material fact  
6 that Dr. Bauer has not met the 6-month requirement of the SIB rider.  
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8 Under Washington law, however, “[a]n insurer may deny coverage based on the  
9 insured’s failure to comply with the policy only if the insurer was actually *prejudiced* by  
10 the insured’s actions or conduct.” *Kaplan*, 990 P.2d at 995. Whether an insurer has been  
11 prejudiced by an insured’s breach of a portion of the contract is “a question of fact and  
12 will seldom be established as a matter of law.” *Tran v. State Farm Fire and Cas. Co.*,  
13 961 P.2d 358, 365 (Wash. 1998). The insurer has the burden of proving that it has  
14 suffered prejudice from the insured’s breach. *Id.* “Claims of actual prejudice require  
15 affirmative proof of an advantage lost or disadvantage suffered as a result of the breach,  
16 which has an identifiable detrimental effect on the insurer’s ability to evaluate or present  
17 its defenses to coverage or liability.” *Id.* (internal quotation marks and citation omitted).  
18 Although the court finds Pan-American’s articulated prejudice dubious, the court is  
19 reluctant to grant summary judgment on this issue and finds that there is a genuine issue  
20 of material fact regarding whether Pan-American has been prejudiced by Dr. Bauer’s  
21 failure to apply for social security disability benefits within 6 months of becoming  
22 disabled.  
23  
24

## 25 **ii. Eligibility for Social Security Disability Benefits**

26 Pan-American also argues that Dr. Bauer has not met the substantive prerequisites  
27 to be eligible for social security disability benefits. It argues that “Bauer readily and  
28 correctly acknowledges that one must be disabled to receive Social security disability

1 benefits. And he concedes, also correctly that he is ‘not disabled per Social Security  
2 Administration regulations.’ But, he nonetheless argues that he is ‘eligible’ for Social  
3 Security disability benefits - a clear and undisputed requirement for eligibility under the  
4 SIB rider.” Resp. at 15. Dr. Bauer rightfully points out that “Pan-American’s  
5 construction would lead to an absurd result - an illusory benefit.” Reply at 10. Under  
6 Pan-American’s construction of the word “eligible,” the insured would have to qualify for  
7 and receive social security disability benefits. However, receiving social security  
8 disability benefits would disqualify the insured from receiving benefits under the SIB  
9 rider. Plaintiff would be paying for a benefit he would never receive.

11 Dr. Bauer argues that “eligibility” for social security benefits means whether he  
12 would be entitled to receive benefits if the Social Security Administration determined that  
13 he met its definition of disability. The court agrees with this interpretation. Under Pan-  
14 American’s definition, a claimant would never receive benefits under the policy. A  
15 “[c]onstruction which contradicts the general purpose of the contract or results in  
16 hardship or absurdity is presumed to be unintended by the parties.” *Nautilus, Inc. v.*  
17 *Transamerica Title Ins. Co. of Washington*, 534 P.2d 1388, 1391 (Wash. Ct. App. 1975).  
18 The court finds that the term “eligible” means that the claimant has satisfied the criteria  
19 for eligibility to receive social security benefits if the Social Security Administration were  
20 to determine that he was disabled, namely that he satisfies the criteria found in 20 CFR  
21 §§ 404.101(a); 404.130 - 404.133. Pan-American does not dispute Dr. Bauer’s assertion  
22 that he meets these requirements. *See* Resp. at 15.

24 The court finds that there are no genuine issues of material fact that: (1) Dr. Bauer  
25 has been disabled for twelve continuous months; (2) the policy benefit is payable for the  
26 disability; (3) Dr. Bauer was eligible for social security disability benefits when the  
27 disability started; (4) Dr. Bauer is not receiving social security benefits; (5) the rider is in  
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1 force; and (6) Dr. Bauer has provided Pan-American with copies of his correspondence  
2 with the Social Security Administration. However, because an issue of material fact  
3 remains as to whether Pan-American has suffered prejudice due to Dr. Bauer's failure to  
4 apply for social security benefits within 6 months of his disability, the court denies Dr.  
5 Bauer's motion with respect to eligibility for benefits under the SIB rider.

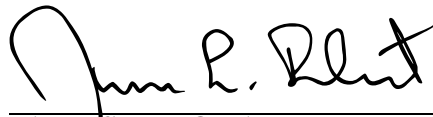
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7 **E. Attorneys' Fees and Costs**

8 Dr. Bauer also seeks attorneys' fees and costs under *Olympic Steamship v.*  
9 *Centennial Ins. Co.*, 811 P.2d 673 (Wash. 1991). The court finds the request for fees  
10 premature and declines to address Dr. Bauer's entitlement to fees at this time.

11 **III. CONCLUSION**

12 For the foregoing reasons, the court GRANTS in part and DENIES in part  
13 Plaintiff's motion for partial summary judgment.

14 DATED this 15th day of October, 2007.

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18 JAMES L. ROBART  
19 United States District Judge  
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